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November 26, 2014

William H. Hyatt, Jr.  
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[william.hyatt@klgates.com](mailto:william.hyatt@klgates.com)

Via Electronic ([hq.foia@epa.gov](mailto:hq.foia@epa.gov)) and Regular Mail

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
FOIA and Privacy Branch  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

Re: Lower Passaic River Study Area  
Freedom of Information Act Appeals: EPA-R2-2014-005768 and EPA-R2-2014-007546

Dear Sir/Madam:

Our firm represents the Cooperating Parties Group ("CPG") with respect to the Lower Passaic River Study Area ("LPRSA"). In follow-up to my letter dated November 7, 2014, I am writing to supplement an appeal of Freedom of Information Act Request ("FOIA Request") EPA-R2-2014-005768 submitted to the United States Environmental Protection Agency ("EPA") Region 2 on April 21, 2014, in relation to EPA's Proposed Plan for the lower eight miles of the LPRSA ("Proposed Plan"). A copy of the FOIA Request is enclosed.

The CPG also submitted FOIA Request EPA-R2-2014-007546 to EPA on June 17, 2014 in relation to EPA's Proposed Plan, which requested:

[A]ny and all documents, including but not limited to emails, memos, reports and correspondence, that form the technical basis for the New Jersey Department of Environmental Protection's ("NJDEP") Fish Advisory Levels, including but not limited to exposure assumptions, toxicity values, and target risk levels used by the NJDEP to derive the Fish Advisory Levels.

A copy of this FOIA Request is also enclosed. EPA sent a letter to the CPG dated November 13, 2014, which provides that all responsive information to this request had been released. The CPG does not believe that EPA has adequately and fully responded to this request, and, therefore, also appeals the same.

FOIA Appeal: EPA-R2-2014-005768

The CPG's FOIA Request EPA-R2-2014-005768 was comprised of 14 sub-points, of which the CPG appeals the following:

Anthony P. La Rocco, Administrative Partner, New Jersey  
[klgates.com](http://klgates.com)

ED\_002570B\_00000228-00001

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Headquarters Freedom of Information Staff

November 26, 2014

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- Numbers 1 and 2. EPA has failed to provide an Access or Excel file that identifies, for each biota tissue sample location, all tissue and sediment sample IDs used to generate the normalized tissue and sediment concentration data pair for that location. EPA has also not provided a flat file dataset in Access or CSV, including requested fields for each sample, that was used to generate the normalized tissue and sediment concentration data pairs that were in turn used to generate a regression model, BSAF curve, or BAF curve presented in Final FFS Appendix A, Data Evaluation Report 6 (Biota Analysis).
  - The bioaccumulation calculations used by the Region are a critical component of the prediction of future recovery and risk estimates for consumption of fish and crabs by the public; the incomplete information provided in the Region's April 2014 FFS and Proposed Plan make it impossible for any interested stakeholder to verify the correctness of the calculations provided in these documents. For example, in the absence of the requested information, it is not possible for the CPG or the public to evaluate spatial and temporal co-location of paired samples, comparability of data (e.g., consistency of tissue type and basis across samples), data relevance (e.g., sediment sample depth), ecological context (i.e., exposure conditions) and influence of non-detects. It is thus not possible to evaluate the quality and relevance of EPA's statistical models that is called for in the recommendations of EPA's Office of Research and Development Ecological Risk Assessment Center (ERASC), produced at the request of the EPA Ecological Risk Assessment Forum (EPA/600/R-06/047).
  - Moreover, it is essential that interested parties are able to independently verify the Region's bioaccumulation calculations since the Region deviated from its own 2006 Modeling Work Plan for bioaccumulation modeling in the LPRSA.
  - Appendix E of the CPG's August 20, 2014 comments on the Proposed Plan provides detail as to how the CPG or any other interested party were unable to adequately review and provide timely comments on the Region's bioaccumulation calculations.
- Number 7. EPA did not provide any correspondence between EPA and NJDEP discussing NJDEP's angler surveys that included sites on the LPRSA, or any data or analysis from those surveys. Draft undated articles/documents by agency staff were provided, including a draft document entitled Consumption Patterns and Risk Assessment of Crab Consumers from the Newark Bay Complex, which summarizes results of Newark Bay Complex angler surveys from 1995, 2002, and 2005. However, raw data files were not provided and it is not known whether sites on the LPRSA were included in these surveys.

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Headquarters Freedom of Information Staff

November 26, 2014

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- Number 8 and 9. While limited and largely non-substantive correspondence has been provided, EPA withheld responsive information to these request numbers as outlined in a 60-page withholding log. The withholding log includes the following categories: email from; email to; sent date; subject/file name; and exemption explanation. Each of the documents was withheld on the basis of Exemption 5 of FOIA. However, the CPG believes that the type of information requested would not be generally protected in civil discovery. See *Burka v. U.S. Dep't of Health and Human Services*, 87 F.3d 508 (D.C. Cir. 1996). Further, there was correspondence that was produced that appears to be of a similar nature as correspondence that was withheld based on the limited information identified in the withholding log (e.g., e-mails between A. Yeh and A. Legare dated 2/22/13, 2/25/13 and 3/11/13 regarding NRRB recommendations for Passaic? -- Produced; e-mail from A. Legare to A. Yeh dated 3/12/13 regarding NRRB recommendations for Passaic? - Withheld on the basis of Exemption 5: attorney-client communications; attorney work product reflecting mental impressions, conclusions, opinions and/or legal theories; predecisional and deliberative). In addition, there was correspondence labeled as exempt under attorney-client communications, but that was not sent among attorneys. Thus, the CPG does not believe that EPA has met its burden to justify its decision to withhold the documents.
- Number 10. EPA has not provided materials responsive to Request Number 10 for technical bases (analyses, calculations, modeling files and results, mapping, and any other relevant materials) used to develop the capping area footprints for Alternative 4. EPA referred the CPG to files provided in Appendix B of the FFS, but such materials are not responsive to this request.
- Number 14. In response to the CPG's request for data set used to develop EPCs used in the Ecological Risk assessment and shown in Table 7-6 of the FFS RI, EPA indicated information was in datasets in the appendices to the FFS. However, the CPG has not been able to recreate the UCLs and cannot independently verify the sample counts and basic statistics for the UCLs. Further, EPA has not documented over what area it used the data.

## FOIA Appeal: EPA-R2-2014-007546

EPA also has not adequately and fully responded to FOIA Request EPA-R2-2014-007546. EPA provided a 2001 NJDEP memo entitled, "Options for Development of Risk-based Fish Consumption Advisories for PCBs", an email from Gary Buchanan to Marian Olsen dated 2/1/2006 that discusses use of the risk range in setting advisory levels, and a 2013 NJDEP routine tissue monitoring report. While a range of PCB tissue concentrations triggering fish advisories are presented in the 2001 memo, the NJDEP's "trigger levels" that were listed in the EPA's FFS PRG tables ("Do not eat" values of 0.0077 ng/g, 240 ng/g, and 540 ng/g for TCDD-TEQ, PCBs, and mercury, respectively) are not presented in these

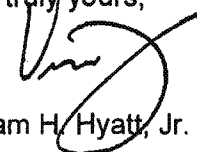
# K&L GATES

Headquarters Freedom of Information Staff  
November 26, 2014  
Page 4

documents. Thus, documentation providing the technical basis of the trigger levels, including toxicity values and exposure assumptions, has not been provided.

As the CPG has advised Region 2, most, if not all, of the outstanding requested documents should have been considered by EPA as part of its supporting analysis in preparation of the Proposed Plan and FFS. Therefore, this information should have been part of the administrative record. However, because it was not part of the administrative record, the CPG and other members of the public were not able to adequately comment on all aspects of the Proposed Plan and FFS by the August 20, 2014 deadline. Further, since such information has still not been provided, the CPG and the public remain unable to fully understand the basis for the Proposed Plan.

Very truly yours,



William H. Hyatt, Jr.

Enclosures

cc: Sarah P. Flanagan, Esq., EPA Region 2, Assistant Regional Counsel  
(via regular mail)

**La Gravenis, Robert Paul**

---

**From:** calderon.wanda@epa.gov  
**Sent:** Monday, April 21, 2014 3:43 PM  
**To:** La Gravenis, Robert Paul  
**Subject:** FOIA Request EPA-R2-2014-005768 Submitted

This message is to confirm your request submission to the FOIAonline application: [View Request](#). Request information is as follows:

- Tracking Number: EPA-R2-2014-005768
- Requester Name: Robert Paul La Gravenis
- Date Submitted: Mon Apr 21 15:42:57 EDT 2014
- Request Status: Submitted
- Description: United States Environmental Protection Agency  
Region 2  
Freedom of Information Officer  
U.S. EPA Region 2  
290 Broadway, 26th Floor  
New York, NY 10007-1866

Re: Diamond Alkali Superfund Site

To Whom It May Concern:

I am submitting this document request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq. This request concerns the United States Environmental Protection Agency's ("EPA") files relating to the Diamond Alkali Superfund Site (the "Site") which includes the former pesticides manufacturing plant and surrounding properties at 80 and 120 Lister Avenue in Newark, New Jersey, the Lower Passaic River Study Area and the Newark Bay Study Area. The EPA Site ID number is NJD980528996.

Specifically, I request copies the documents listed in Attachment A annexed hereto, which relate to EPA's recently Proposed Plan for the Site.

I would ask that you contact me at your earliest convenience to discuss arrangements for providing the requested documents. This firm will of course take responsibility for any necessary copying and/or shipping charges. Your prompt attention to this matter is greatly appreciated. Thank you for your anticipated cooperation.

Sincerely,

Robert Paul La Gravenis

Senior Paralegal  
K&L Gates LLP  
One Newark Center, 11th Floor  
Newark, NJ 07102

robertpaul.lagravenis@klgates.com

**Request Details**

Tracking Number : EPA-R2-2014-005768

	Submitted	Evaluation	Assignment	Processing
<b>Request Information</b>				
Full Name : Robert Paul La	Closed	04/21/2014	Date Submitted :	
Gravenis			Estimated Date of Completion :	May 19, 2014
Organization : K&L Gates			Final Disposition :	
LLP		Undetermined		

**Description :**

United States Environmental Protection Agency  
Region 2  
Freedom of Information Officer  
U.S. EPA Region 2  
290 Broadway, 26th Floor  
New York, NY 10007-1866

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Specifically, I request copies the documents listed in Attachment A annexed hereto, which relate to EPA's recently Proposed Plan for the Site.

I would ask that you contact me at your earliest convenience to discuss arrangements for providing the requested documents. This firm will of course take responsibility for any necessary copying and/or shipping charges. Your prompt attention to this matter is greatly

appreciated. Thank you for your anticipated cooperation.

Sincerely,

Robert Paul La Gravenis

Senior Paralegal

K&L Gates LLP

One Newark Center, 11th Floor

Newark, NJ 07102

robertpaul.lagravenis@klgates.com

### Attached Supporting Files

Attached File	Type	Size (MB)
04_21_14_FOIA_Request_to_USEPA_Region_2.docx	Microsoft Word	0.02

### Released Records

No records have been released.



United States Environmental Protection Agency  
Region 2  
Freedom of Information Officer  
U.S. EPA Region 2

290 Broadway, 26th Floor  
New York, NY 10007-1866

Re: Diamond Alkali Superfund Site

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Specifically, I request copies the documents listed in Attachment A annexed hereto, which relate to EPA's recently Proposed Plan for the Site.

I would ask that you contact me at your earliest convenience to discuss arrangements for providing the requested documents. This firm will of course take responsibility for any necessary copying and/or shipping charges. Your prompt attention to this matter is greatly appreciated. Thank you for your anticipated cooperation.

Sincerely,

Robert Paul La Gravenis

Senior Paralegal  
K&L Gates LLP  
One Newark Center, 11th Floor  
Newark, NJ 07102  
[robertpaul.lagravenis@klgates.com](mailto:robertpaul.lagravenis@klgates.com)

## ATTACHMENT A

### Documents Requested from EPA Region 2 on 4/21/14

1. An Access or Excel file containing each normalized tissue and sediment concentration data pair (with units, basis and data qualifiers) used to generate a regression model, Biota-Sediment Accumulation Factor (BSAF) curve or Biota Accumulation Factor (BAF) curve presented in Final FFS Appendix A, Data Evaluation Report 6 (Biota Analysis).
  - o The Access or Excel file should identify, for each biota tissue sample location, all tissue and sediment sample IDs used to generate the normalized tissue and sediment concentration data pair for that location.
2. A flat file dataset in Access or CSV including at least the following fields for each sample that was used to generate the normalized tissue and sediment concentration data pairs that were used to generate a regression model, BSAF curve or BAF curve presented in Final FFS Appendix A, Data Evaluation Report 6 (Biota Analysis):
  - o Source
  - o Study
  - o Location
  - o Coordinates
  - o River mile (if appropriate)
  - o Species and tissue type (for each tissue sample)
  - o Sample depth (for each sediment sample)
  - o Sample ID
  - o Sample type (e.g., field duplicate)
  - o Analyte name, including all contaminants, lipid, TOC and iron
  - o Numeric concentration for each analyte, including numeric concentrations for each sum component (e.g., for Polycyclic Aromatic Hydrocarbon (PAH) mixtures) and calculated totals
  - o Data qualifiers
  - o Units
  - o Basis (e.g., dry weight)
3. Data files, including database query output (e.g., sample ID, analytical results, qualifiers) and ProUCL input file, for tissue samples included in current baseline Human Health Risk Assessment (HHRA) fish and crab tissue Exposure Point Calculations (EPC)
4. Technical bases (analyses, calculations, model files and results, and any other relevant materials) for EPA's sliding scale of annual averages based on receptor exposure duration (used to estimate future concentrations)
5. Technical back-up/documentation for EPA's analysis of 2000 US Census data for Essex and Hudson counties (used to estimate residence time)
6. Technical back-up/documentation for EPA's re-analysis of Joanna Burger's 1999 survey of Newark Bay anglers (used to estimate fish and crab consumption rates)

7. Any correspondence between Region 2 and NJDEP on NJDEP angler surveys that included sites on the LPR, and any data and analysis from those surveys

8. Any correspondence between the Region and the National Remedy Review Board (NRRB) since the group's comments were submitted in Nov. 2012 and issuance of the NRRB/Contaminated Sediments Technical Advisory Group (CSTAG) final comments on April 11, 2014

9. Any correspondence between the Region 2 and HQ on draft versions of the Proposed Remedial Action Plan (PRAP) and Focused Feasibility Study (FFS) documents

10. Technical bases (analyses, calculations, modeling files and results, mapping, and any other relevant materials) used to develop the capping area footprints for Alternative 4

11. Technical backup/documentation for all unit or rollup cost items > \$5,000 that cite to "Internal Database" in FFS Appendix H

12. The Louis Berger Group, Inc., 2007. "Staging and Processing Areas, Treatment Technologies, and Transportation Logistics Review." Lower Passaic River Contract. Prepared for the NJDEP. April 2007.

13. Data and technical basis for 1) modeled background tissue concentrations, and 2) modeled future tissue concentrations, including the technical basis of EPA's sediment-tissue regression models for HHRA species evaluated in the FFS.

14. The data set used to develop EPCs used in the Ecological Risk assessment and shown in Table 7-6 of the FFS RI. This would include EPCs for sediment, the tissue concentrations for the 'generic fish', biota tissue for mummichog, and crab EPCs.

**La Gravenis, Robert Paul**

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**From:** calderon.wanda@epa.gov  
**Sent:** Tuesday, June 17, 2014 12:42 PM  
**To:** La Gravenis, Robert Paul  
**Subject:** FOIA Request EPA-R2-2014-007546 Submitted

This message is to confirm your request submission to the FOIAonline application: [View Request](#). Request information is as follows:

- Tracking Number: EPA-R2-2014-007546
- Requester Name: Robert Paul La Gravenis
- Date Submitted: 06/17/2014
- Request Status: Submitted
- Description: I am submitting this document request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq. This request concerns the United States Environmental Protection Agency's ("EPA") files relating to the Diamond Alkali Superfund Site (the "Site") which includes the former pesticides manufacturing plant and surrounding properties at 80 and 120 Lister Avenue in Newark, New Jersey, the Lower Passaic River Study Area and the Newark Bay Study Area. The EPA Site ID number is NJD980528996.

Specifically, EPA's Proposed Plan for the lower 8 miles of the Site provides as follows: "The NJDEP use of do not eat values of 0.0077 ng/g, 240 ng/g, and 540 ng/g to set fish consumption advisories for 2,3,7,8-tetrachlorodibenzo-p-dioxin - toxic equivalency ("TCDD-TEQ"), polychlorinated biphenyls ("PCBs") and mercury, respectively. Use of PRGs that exceed these NJDEP advisory triggers would not be protective of allow additional consumption of fish/crabs" (hereinafter referred to as "Fish Advisory Levels"). The cited language regarding Fish Advisory Levels is found in the footnotes for Table 2-10 in the FFS report, as well as the footnotes for Tables 1-8 and 1-10 of Appendix E.

In particular, I request any and all documents, including but not limited to emails, memos, reports and correspondence, that form the technical basis for the New Jersey Department of Environmental Protection's ("NJDEP") Fish Advisory Levels, including but not limited to exposure assumptions, toxicity values, and target risk levels used by the NJDEP to derive the Fish Advisory Levels. I would ask that you contact me at your earliest convenience to discuss arrangements for providing the requested documents. This firm will of course take responsibility for any necessary copying and/or shipping charges. Your prompt attention to this matter is greatly appreciated. Thank you for your anticipated cooperation.

**Request Confirmation****Request Information**

Tracking Number : *EPA-R2-2014-007546*

Requester Name : Robert Paul La Gravenis

Date Submitted : 06/17/2014

Request Status : Submitted

Description :

I am submitting this document request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq. This request concerns the United States Environmental Protection Agency's ("EPA") files relating to the Diamond Alkali Superfund Site (the "Site") which includes the former pesticides manufacturing plant and surrounding properties at 80 and 120 Lister Avenue in Newark, New Jersey, the Lower Passaic River Study Area and the Newark Bay Study Area. The EPA Site ID number is NJD980528996.

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In particular, I request any and all documents, including but not limited to emails, memos, reports and correspondence, that form the technical basis for the New Jersey Department of Environmental Protection's ("NJDEP") Fish Advisory Levels, including but not limited to exposure assumptions, toxicity values, and target risk levels used by the NJDEP to derive the Fish Advisory Levels.

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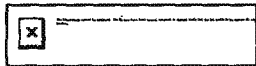
**Lewis, Judith**

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**From:** Monsen, Dawn M. <dawn.monsen@klgates.com>  
**Sent:** Wednesday, November 26, 2014 3:06 PM  
**To:** FOIA HQ  
**Cc:** Hyatt, Jr., William; Mack, Karyllan Dodson  
**Subject:** Freedom of Information Act Appeal: EPA-R2-2014-005768 and EPA-R2-2014-007546  
**Attachments:** removed.txt; NW-#470212-v1-Freedom\_of\_Information\_Request\_Letter\_11\_26\_2014.pdf

Please see the attached Freedom of Information Act Appeal for Request Nos: EPA-R2-2014-005768 and EPA-R2-2014-007546.

Regards,  
Dawn Monsen



**Dawn M. Monsen, Esq.**  
K&L Gates LLP  
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Newark, New Jersey 07102  
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